86 - 1425

Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1986

YAKIMA TRIBAL COURT OF THE YAKIMA INDIAN NATION AND DAVID WARD, TRIBAL JUDGE,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES B. HOVIS
Counsel for Petitioners

316 North Third Street
Post Office Box 487
Yakima, WA 98907
(509) 575-1500

QUESTIONS PRESENTED

1. Whether it is premature for a district court to declare a restraint issued by a tribal court null and void and enjoin its enforcement because the collateral action was brought by the United States, where:

   a. It was uncontested in tribal court that the trespass on and taking of a portion of a trust allotment by the restrained parties, who the United States claimed possessed immunity in the subsequent and much later collateral action, were in violation of federal law, regulations and without authority; and,

   b. The restrained parties refused to appear in tribal court and raise any defense including the affirmative defense of immunity from suit.

2. Whether under the *Larson-Malone* test of this Court, the action of federal officers can be the basis of the specific relief of restraint where the officers were trespassing on and appropriating a portion of individually owned Indian trust lands without the owners' consent and such trespass and appropriation were in violation of applicable federal statutes, regulations, instructions of their superiors, and the constitutional prohibition of taking without compensation; or does the general authority of federal employees to enter on an Indian reservation and to relocate irrigation laterals, standing alone, entitle federal officers to absolute immunity?

3. Whether the executive departments can, by authorizing and bringing a suit in the name of the United States, waive the sovereign immunity of a tribal court and its judge when Congress and this Court have refused to do so?

LIST OF PARTIES

The parties to the proceedings below were the respondent United States of America and petitioners Yakima Tribal Court and David Ward, Tribal Judge. The Yakima Tribal Court is the tribal court of the Confederated Tribes and Bands of the Yakima Indian Nation recognized as such by the United States of America. David Ward is its chief judge.

The Confederated Bands and Tribes of the Yakima Indian Nation comprise 14 originally distinct Indian tribes that joined together in the middle of the 19th century for purposes of their relationships with the United States. A treaty was signed with the United States in 1855, under which it was agreed that the various tribes would be considered "one nation" and specified lands located in the Territory of Washington would be set aside for their exclusive use. The treaty was ratified by Congress in 1859. 12 Stat. 951. Since that time, the Yakima Nation has, without interruption, maintained its tribal identity. *Washington v. Yakima Indian Nation*, 439 U.S. 463, 469 (1979).

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IN THE
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners, Yakima Tribal Court and David Ward, Tribal Judge, respectfully pray that a writ of certiorari issue to review the judgment and opinion, entered in these proceedings on July 21, 1986, as amended by an amended opinion, entered in these proceedings on December 4, 1986, by the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The December 4, 1986 opinion of the Ninth Circuit

is reported at 806 F.2d 853, and is reprinted as Appendix A hereto, p. 1a, *infra*. The July 21, 1986 judgment and the December 4, 1986 order of the Ninth Circuit are not reported and they are reprinted in Appendix B hereto, p. 18a and p. 19a, *infra*. The July 21, 1986 opinion of the Ninth Circuit is not included in the appendix because it was amended by the December 4, 1986 opinion, but it is reported at 794 F.2d 1402.

The May 24, 1985 order of the Eastern District granting plaintiff-respondent's motion for summary judgment and denying petitioner-defendants' cross motion (Quackenbush, D.J.) and judgment on the order have not been reported. The order is reprinted as Appendix C hereto, p. 20a, *infra*, and the judgment is reprinted as Appendix D hereto, p. 23a, *infra*.

JURISDICTION

Invoking jurisdiction under 28 U.S.C. §§ 1331 and 1345, the plaintiff-respondent United States brought this suit in the Eastern District of Washington against the tribal court and its judge. On May 24, 1985, the Eastern District granted plaintiff-respondent United States' motion for summary judgment and denied the cross motion of the defendants. On the appeal of petitioner tribal court and petitioner judge, the Ninth Circuit, on July 21, 1986, entered a judgment and opinion affirming the Eastern District's order. On July 30, 1986, petitioner tribal court and petitioner judge timely filed a petition for rehearing en banc. On

December 4, 1986, the Ninth Circuit entered an amended opinion affirming the Eastern District's order. This petition for writ of certiorari is filed within ninety (90) days of December 4, 1986. The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS AND FEDERAL INSTRUCTIONS INVOLVED.

The constitutional provisions, statutes, regulations and federal instructions to Bureau of Indian Affairs Irrigation Projects are reprinted in the appendixes hereto. *United States Constitution*, Amendment V, is reprinted as Appendix E hereto, p. 24a, *infra;* 5 U.S.C. § 702 is reprinted as Appendix F hereto, p. 25a, *infra;* 25 U.S.C. §§ 324 and 325 are reprinted as Appendix G hereto, p. 26a, *infra;* 25 U.S.C. §§ 1302 and 1303 are reprinted as Appendix H hereto, p. 28a, *infra;* 25 C.F.R. Part 169.3 is reprinted as Appendix I hereto, p. 30a, *infra;* Commissioner of Bureau of Indian Affairs Instructions Regarding Rights-of-Way to Irrigation Projects is reprinted as Appendix J hereto, p. 32a, *infra.*

STATEMENT OF THE CASE

This case arises from the efforts of two members of the Yakima Indian Nation to prevent federal officials from illegally locating an irrigation canal on their trust allotted land within the Yakima Indian Reserva-

tion without their permission. These members sought relief from this entry in the Yakima Tribal Court by filing and serving a complaint alleging that the named defendants had brought large equipment on their land without their permission and asking that the federal officials be restrained. Temporary restraining orders were obtained and served, restraining defendants from coming on plantiffs' land.

On April 16, 1983, at a noticed hearing in the Yakima Tribal Court, tribal landowners, on the showing by plaintiff landowners that the defendant federal employees were on the landowners' property without authority or permission, the Yakima Tribal Court made the restraint permanent. No appearance was made by the restrained defendants. Instead, the Regional Solicitor paternalistically submitted an ex parte communication to the tribal court, indicating that the tribal court had no jurisdiction over the matter and the federal employees were directed not to appear. Almost a year later, on March 17, 1984, the United States brought this action against the tribal court and its judge in the Eastern District. The complaint admitted that no appearance had been made in the Yakima Tribal Court but asked that its permanent restraining order be declared null and void by the Eastern District on the ground that the tribal court defendants were federal officials and the Yakima Tribal Court lacked jurisdiction.

Answer of the tribal court and its judge alleged, among other things, that the restrained actions were in violation of Amendment V of the *Constitution*, laws of the United States and administrative direction given to the federal employees. Defendants tribal court and its judge interposed the affirmative defenses of failure to exhaust remedies in tribal court, judicial and sovereign immunity, lack of jurisdiction, exclusivity of habeas corpus proceedngs, failure to state a federal cause of action and lack of case and controversy. On March 7, 1985, the United States moved for summary judgment to declare the tribal court action null and void and to enjoin petitioners from taking any action to enforce the restraint on the basis that the petitioners had no jurisdiction in tribal court over the persons or subject matter.

In response, the tribal court and judge filed a cross motion and by memorandum raised the United States' failure to fulfill requirements of Rule 56, Federal Rules of Civil Procedure, that the defendants in tribal court were not entitled to immunity as their acts were contrary to law, regulations and instructions from line authority and were not permitted under the Fifth Amendment, and that the tribal court and its judge were entitled to immunity from suit.

On May 14, 1985, the Eastern District entered summary judgment granting the United States declaratory and injunctive relief. The Eastern District determined

and noted that while the Yakima Nation and its court possess absolute sovereign immunity, such immunity does not extend to suits brought by the United States. On the other hand, the court stated that sovereign immunity does operate in the case of federal employees, barring jurisdiction over federal employees regardless of whether or not their actions were in violation of federal law and regulations. (App. C, p. 21a.)

In due course, the tribal court and its judge appealed to the Ninth Circuit from this judgment and order. The tribal court and its judge invoked the Ninth Circuit's jurisdiction under 28 U.S.C. § 1291 to review final decisions of district courts. The Ninth Circuit addressed the immunity and exhaustion of remedy issues and determined that the federal employees, not the tribal court, had immunity and that the federal employees need not exhaust their tribal court remedies, thereby affirming the judgment of the Eastern District. In the portion of its amended opinion addressing the immunity of the federal employees, the Ninth Circuit concluded that the claim of unconstitutional action could only be made against the federal employees and not the United States in this collateral action and that there was no substantial claim. (App. A, p. 11a.)

The Ninth Circuit also concluded that the employees' action was not unconstitutional and the result of their acts was limited to a claim of just compensation

and the specific remedy of restraint should not have been granted by the tribal court and its judge. (App. A, p. 11a.) Focusing on the claim that the employees had lost their immunity due to a violation of law and regulation, the Ninth Circuit concluded as a matter of law that since the federal employees had apparent authority to enter the reservation to relocate irrigation canals, violation of federal statutes and regulations regarding obtaining owner consent to right-of-way changes was immaterial regarding immunity from suit to restrain their trespass. (App. A, p. 13-14a.) Addresing the exhaustion of remedies issue, the Ninth Circuit's amended opinion concluded that since the tribal court's power to exercise jurisdiction was automatically foreclosed, exhaustion of remedies was not required. (App. A, p. 15-16a.)

The final portion of the Ninth Circuit's amended opinion addressed the immunity of the tribal court and concluded that though it and its judge generally would be entitled to immunity from suit, this immunity was not applicable in a suit brought by the United States. (App. A, p. 16-17a.)

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit opinion directly conflicts with the rule of this Court declaring it is premature for a district court to determine tribal court limits of lawful jurisdiction before remedies are exhausted in tribal court.

This Court has made it clear in *National Farmers Union Insurance Company v. Crow Tribe*, 471 U.S. __, 85 L.Ed.2d 818, 827, 105 S. Ct. 2447 (1985), that it is premature for a district court to determine that a tribal court has exceeded the lawful limits of its jurisdiction until available remedies have been exhausted in tribal court. In announcing this rule requiring tribal court examination in the first instance, this Court noted that the Court-recognized congressional policy supporting tribal self-government and self-determination favors this rule. *National Farmers Union, supra*, 85 L.Ed.2d at 827.

Moreover, this Court noted that this rule follows this nation's policy regarding tribal self-government, will provide for orderly administration of justice, limiting of procedural problems, encourage the tribal courts to explain their basis for jurisdiction and will provide reviewing courts with the benefit of the tribal court expertise. *Id.* We note that this rule also favors the availability of justice and conservation of federal judicial resources supported by this Court. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817, 820 (1976).

The contrary rule, announced by the Ninth Circuit, discredits tribal self-government and its judicial system, favors unlawful action, self-help and government by people not laws. No citation or extended argument is necessary to show that the Ninth Circuit rule will

encourage self-help to repel unlawful trespass if the only remedy is in the distant Eastern District. The seat of the Eastern District is hundreds of miles away and its use is expensive. The Yakima Indian Reservation has been free from the self-help and demonstrations experienced on some other reservations. We suggest that this result was dependent in part by the satisfactory exercise of the Yakima Nation's law and order function. *See: Washington v. Yakima Indian Nation*, 439 U.S. 463, 489 n.33 (1979). The *Treaty with the Yakimas*, 12 Stat. 951, clearly states that the signatory fourteen tribes and bands for the "purpose of this treaty are to be considered one nation". In *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 560-561, this Court determined the use of the treaty term "nation" called for the retention of powers of self government like other nations.

The *Treaty with the Yakimas*, *supra*, set the Yakima Indian Reservation apart for the exclusive use of the Yakimas. This Court, in *Williams v. Lee*, 358 U.S. 217, 221 (1958), determined that this language provided for internal affairs remaining *exclusively* with the tribal government. Far from being an anomoly, the Yakima Nation's reserved right to control its internal affairs is only more clear than that of other tribes. From *Worcester v. Georgia*, *supra*, through *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983), this Court has emphasized that Indian tribes

constitute "political communities", enjoying substantial "sovereign" powers over both members and non members within their reservations. Looking only to the last 25 years, this Court has made this point no less than a dozen times.

See: Williams v. Lee, 358 U.S. 217, 223 (1959); *Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685, 690-692 (1965); *Kennerly v. District Court*, 400 U.S. 423, 426-427 (1971); *United States v. Mazurie*, 419 U.S. 544, at 557-558 (1975); *United States v Antelope*, 430 U.S. 641, 645 (1977); *United States v. Wheeler*, 435 U.S. 313, 323 (1978); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152-154 (1980); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142, 151 (1980); *Montana v. United States*, 450 U.S. 544, 565-566 (1981); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140, 146-148 (1982); *Ramah Navajo School Board, Inc. v. Bureau of Revenue*, 458 U.S. 832, 837-838 (1982); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-336 (1983).

II. The Ninth Circuit opinion directly conflicts with this Court's "Larson-Malone" test under which the action of federal officers affecting property can be the basis of an action for specific relief against the officers as individuals, and the officers are not immune from suit when the officers' actions are not

within the officers' statutory powers, or if within the powers or exercise thereof, constitutionally void.

Like suits against a tribe, suits against the United States are barred by sovereign immunity in the absence of an express waiver of immunity by Congress. However, the so-called "officer suits" exemption for an injunction forbidding interference with property rights was early recognized by this Court. Though *United States v. Lee*, 106 U.S. 196 (1882) is quite often thought of as being the leading case, *Meigs v. M'Clung's Lessee*, 13 U.S. (9 Cranch) 10, (1815) is an earlier case and, like the matter in Yakima Tribal Court, involved intrusion by a federal official onto Indian lands. Therein, the unauthorized actions of federal officers were the basis of a successful ejectment action.

As discussed in *Block v. North Dakota*, 461 U.S. 273, 281-282 (1983), the rule in officer suits has evolved into what was designated the "Larson-Malone test". Under such test, the general rule of immunity for federal officials has two exceptions. Those exceptions are: (1) action by officials beyond their statutory powers, and (2) even though within the scope of their authority, the powers themselves or the manner in which they are exercised are constitutionally void. *See: Dugan v. Rank*, 272 U.S. 609, 621-622 (1963); *Larson v. Domestic and Foreign Commerce Corporation*, 337 U.S. 682, 702 (1949); *Malone v. Bowdoin*, 369 U.S.

643, 647 (1962); and, *Block v. North Dakota, supra.*

It was not disputed, as it was not disputed in Yakima Tribal Court, that the federal officials were beyond their statutory power. The Ninth Circuit held that unlike constitutional violations (Exemption 2, *supra*) that there is no per se divestiture of sovereign immunity where the officials are pursuing their apparently authorized duties and like the Eastern District determined that it was immaterial as to whether the violation was so inconsistent with the officials' authority that they divested themselves of sovereign immunity. (App. A, p. 15-16a.) The lower court compounded this error by saying that the landowners were limited to an action for damages for the unconstitutional taking. Both determinations are in direct conflict with this Court's opinions that have evolved the *Larson-Malone* test.

Further, it is noted that in 1976 Congress enacted a general consent to such suits. *See,* 5 U.S.C. 702; *United States v. Mitchell,* 463 U.S. 206, 227 n.32 (1983). It is interesting to note that in *United States v. Mitchell, supra,* the United States contended that violations of duties imposed by statute may be cured by actions for declaratory, injunctive or mandamus relief rather than the action for damages against the United States, which the Ninth Circuit opinion suggests is the landowners' only basis for relief. *Mitchell, Id.* This Court has sustained both types of relief where

the officers violated duties imposed by statute. *Id.*

Further, this Court has determined that immunity from suit is an affirmative defense that must be pleaded by the officials. *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982); *Gomez v. Toledo*, 446 U.S. 635 (1980). The federal officials did not even appear and the paternalistic ex parte direction of the Regional Solicitor, not served on the complaining party, was properly rejected by the Tribal Court. *Smith v. Confederated Tribes of Warm Springs*, 783 F.2d 1409, 1411, 1412 (9th Cir. 1986).

The involved federal officials in the Yakima Tribal Court proceedings entered an allotment without the owners' consents for the purpose of appropriating a portion of their individually owned lands for an irrigation lateral, contrary to statute. (*See:* App. G, p. 26a), regulation (*See:* App. H, p. 28a), and Commissioner of Bureau of Indian Affairs Instructions Regarding Rights-of-Way, to Irrigation Projects (App. J, p. 32a). Further, it was in violation of the Fifth Amendment. *See:* App. E, p. 24a; *Shoshone Tribe v. United States*, 229 U.S. 476, 492-498 (1937); *Choate v. Trapp*, 224 U.S. 665, 675-678 (1912); and *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 83-86 (1977).

The opinions of the Ninth Circuit and the Eastern District accord sovereign immunity to violators of the Constitution, statute, regulation, and instructions, merely because they were permitted to be on the Yak-

ima Reservation. The officials, however, were not permitted to enter the lands in question without obtaining a written right-of-way. The opinions below granting these violators sovereign immunity are in direct conflict with the decisions of this Court.

III. The Ninth Circuit opinion accords to the executive Departments of Justice and Interior constitutional or congressional prerogative of consenting to suit against Indian tribes contrary to the decisions of this Court. This question is substantial.

The Ninth Circuit opinion correctly points out that the Yakima Nation's sovereign immunity, and the tribal court's and the judge's immunity as a derivative thereof, would bar a suit brought by other than the United States.

The Eastern District and the Ninth Circuit opinions base the determination that tribes have no immunity from suits by the United States on an incorrect analysis of *United States v. Mississippi*, 380 U.S. 128 (1965). Under this Court's understanding of the principle of sovereign immunity, it recognized that "acceptance of the constitutional plan" puts some limitations on the power of a state to avoid suit. Suits brought by sister states or by the United States are thus not prohibited. *United States v. Mississippi*, 380 U.S. 128, 140-141 (1965).

However, Indian tribes and the Yakima Indian Nation are not part of nor have they accepted the con-

stitutional plan. The provisions of the *Constitution* are not applicable to Indian tribes. *Talton v. Mayes*, 163 U.S. 376 (1896). Congress need not base its waiver of sovereign immunity on the constitutional plan but rather on its plenary power. Limitations on the sovereign immunity of Indian tribes must be by "affirmative statutory authority". *United States Fidelity and Guaranty Company*, 309 U.S. 506, 514 (1940).

When Congress wants to limit sovereign immunity it knows how to do so. It has limited the sovereign immunity of tribes as regards violations of civil rights, but provides that the action brought must be by writ of habeas corpus. *See*, 25 U.S.C. 1302, App. H, p. 28a. Congress has not authorized any limitation in actions such as were before the Eastern District and the Ninth Circuit. The petitioner Yakima Tribal Court and its judge were entitled to be accorded their pleaded affirmative defense of sovereign immunity. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

The Executive Departments of Justice and Interior have long supported tribal immunity from suit. However, when one of their own is involved, by authorizing suit and prosecuting same, they wish to usurp the powers of Congress. The Ninth Circuit opinion on this important matter is contrary to the decisions of this Court.

CONCLUSION

The petition for writ of certiorari should be granted. If the decisions discussed herein provide sufficient guidance as to the questions raised, the judgment of the Ninth Circuit should be remanded for reconsideration in light of this Court's instructions. Otherwise it should be heard on the merits here, the judgments of the Eastern District and the Ninth Circuit vacated and remanded for dismissal of the action.

Respectfully submitted,

JAMES B. HOVIS
316 North Third Street
Post Office Box 487
Yakima, Washington 98907
(509) 575-1500
Counsel for Petitioners

February 27, 1987

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-3927

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

YAKIMA TRIBAL COURT OF THE YAKIMA INDIAN NATION AND DAVID WARD, TRIBAL JUDGE, DEFENDANTS-APPELLANTS.

Appeal from the United States District Court
for the Eastern District of Washington
District Judge Justin L. Quackenbush, Presiding

Argued February 14, 1986 - Seattle

Submitted March 7, 1986*

Filed July 21, 1986

AMENDED OPINION

Before: WRIGHT and WALLACE, Circuit Judges, and LEGGE, District Judge.**

WRIGHT, Circuit Judge:

This case arises from the efforts of two Yakima Indian sisters to prevent federal officials from relocating an irrigation canal on their land. They won a permanent restraining order in tribal court. The United States sued in district court to void the order on the ground that the tribal court lacked jurisdiction to enjoin federal officials from performing their official duties. The district court granted the government's

* We deferred submission pending a decision in *United States v. White Mountain Apache Tribe,* 784 F.2d 917 (9th Cir. 1986).

** Hon. Charles A Legge of the Northern District of California.

motion for summary judgment, and the tribal defendants appealed. We affirm.

ISSUES

(1) Is the case mooted by a final settlement in which the Indian sisters agreed to grant the Interior Department a right-of-way across their land for irrigation purposes?

(2) Did the district court have jurisdiction to enjoin enforcement of tribal court orders?

(3) Does sovereign immunity of the United States bar the tribal court action?

(4) Was the United States required to exhaust tribal court remedies before filing this action?

(5) Are the Yakima Tribal Court and its judge immune from this action under tribal immunity principles? and

(6) May Tribal Court Judge Ward invoke the doctrine of judicial immunity?

FACTS AND PROCEEDINGS BELOW

Viola Sohappy and LaRena Sohappy Brown, Yakima Indians, own Trust Allotment No. 1906 on the Yakima Indian Reservation.[1] For many years, an irrigation canal in the Wapato Irrigation Project ("WIP") has carried water to and across the Sohappys' land. The WIP is administered by the Bureau of Indian Affairs ("Bureau") in the Interior Department. The Project Engineer is Louis B. Hilderbrand.

The original canal ran along the north side of the

[1] *See generally Washington v. Confederated Bands and Tribes of the Yakima Indian Nation,* 439 U.S. 463,469-70 (1979), and *Yakima Indian Nation v. Whiteside,* 617 F. Supp. 750, 751-52 (E.D. Wash. 1985), for background on the Yakima Nation.

allotment to a point near the northeast corner. From there, it angled southeast across a corner of the allotment, and then ran along the eastern boundary. The WIP also used a small ditch on the northern boundary to convey water to properties to the east. The ditch began where the canal angled to the southeast.

In 1980, a WIP employee and the Sohappys' lessee discussed moving the canal to avoid transecting the northeast corner. Both parties believed that the property would be enhanced if the canal were moved to the northern and eastern boundaries. This entailed filling in the diagonal canal and enlarging the ditch.

WIP employees accomplished the filling and had begun enlarging the ditch when the Sohappys learned of the activities. They objected because WIP acted without their consent. Negotiations ensued.

The Sohappys consulted with the Bureau's Portland Area Office, which acknowledged that Hilderbrand erred by not having secured their permission for the changes. The negotiations culminated in a settlement agreement of April 24, 1981. It allowed WIP to convey water through the allotment for two years until permanent relocation could be made to the north and east. During this period, WIP was to pay $11,000 for continued use of the canal.

Final relocation was accomplished in April 1983. The canal has since been used for irrigation purposes.

On April 10, 1983, the Sohappys sued WIP and its

Project Engineer in Yakima Tribal Court. They sought a restraining order to keep WIP employees from their property and to halt completion of the canal relocation. The complaint was delivered to the WIP office on the reservation.

The federal defendants did not appear for the hearing on the request for a restraining order. Instead, an Assistant Regional Solicitor wrote to the tribal court explaining that it was "without jurisdiction to grant relief against the United States, its officers and employees in the performance of their official duties." The letter suggested that federal district court was the proper forum for such a suit.

Following the issuance of two temporary restraining orders, tribal court Chief Judge Ward entered an order permanently restraining Hilderbrand and other WIP employees from entering onto Allotment 1906. Despite having received the government's letter, he stated: "Having heard nor received nothing from the defendants this court was left with nothing to do but to grant the plaintiffs [*sic*] requests."

In March 1984, the United States brought this action in district court against the Yakima Tribal Court and Judge Ward. It sought: 1) a declaratory judgment that the tribal court's injunction was void, and 2) an injunction restraining further interference with WIP. Both sides moved for summary judgment.

Ruling for the government, the court held that the

United States' sovereign immunity barred the tribal court action because it was "a prohibited, unconsented suit against the United States." It found that Hilderbrand was operating within the scope of his official authority.

As to the tribe's claim that it was immune from suit, the court held that tribal immunity does not operate against the United States. It declared the tribal court orders null and void and permanently enjoined the tribal defendants from enforcing them.

Shortly before oral orgument, we learned of a recent settlement agreement in the underlying action. In December 1985, the Sohappys agreed to grant the Interior Department a right-of-way over their land in exchange for $18,000. This suggested the possibility of mootness on which we requested supplemental briefing.

STANDARD OF REVIEW

We review *de novo* the grant of summary judgment. *Augustine v. McDonald*, 770 F.2d 1442, 1444 (9th Cir. 1985). Review of the district court's jurisdiction also is *de novo*. *Clayton v. Republic Airlines, Inc.*, 716 F.2d 729, 730 (9th Cir. 1981).

ANALYSIS

I. MOOTNESS

While the parties resist a finding of mootness, we consider our jurisdiction *sua sponte*. *See Baumann v. Arizona Department of Corrections*, 754 F.2d 841, 843

(9th Cir. 1985). We will not issue an advisory opinion in a moot case. *See Lake Coal Co. v. Roberts & Schaefer Co.*, — U.S. —, 106 S. Ct. 553, 554 (1985) (parties' motion to decide issues of moot case denied).

This action is grounded in the existence of a tribal court order restraining federal officers from performing their official duties. It reads:

> IT IS HEREBY ORDERED that defendants are perminantly [*sic*] restrained from going onto Allotment 1906 and the residence at Rt. 3 Box 2125A, Wapato, WA, Yakima Indian Nation until such time as plaintiffs petition this court to have the restraining order removed.

Counsel for the appellants tells us that the Sohappys do not intend to petition the tribal court to dissolve the order. Nor will the issuing judge vacate it *sua sponte*.

The situation is somewhat analogous to *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911), where the Court held that a civil contempt action was mooted by the settlement of the underlying injunction. The Court reasoned:

> [W]hen the main cause was terminated by a settlement of all differences between the parties, the complainant did not require and was not entitled to any compensation or relief [in the contempt proceedings]. The present proceeding necessarily ended with the settlement of the main cause of which it is a part.

Id. at 451-52.

Gompers involved two proceedings in the same court. But here the settlement was between the parties to the tribal court action, the Sohappys and the Inter-

ior Department. *See Southern Ohio Coal Co. v. Donovan*, 774 F.2d 693, 698-99 (6th Cir. 1985) (appeal not moot where settlement involved different parties and issues), *amended*, 781 F.2d 57 (6th Cir. 1986). Before us we have the tribal court and its chief judge as appellants and the United States, represented by Justice Department attorneys, as appellee. No party to this appeal nor any attorney was involved in the settlement.

Further, we note that the tribal court's order appears to be broader than necessary to resolve the dispute between the Sohappys and the government. It restrains the government from entry onto the land for any purpose. Thus, while the dispute between the Sohappys and the government might now be mooted, the broader restraint issued by the tribal court against the United States has not been mooted.

Finally, we must consider the effect of a finding of mootness. We would then be obligated to vacate the district court judgment and remand with instructions to dismiss the complaint. It is the tribal court order that should be vacated due to the settlement. We may decide the validity and effect of that order only by considering the merits of this appeal.

The peculiar circumstances here require that we conclude that the appeal is not moot. The existence of the order restraining federal officials from performing their official duties provides continuing consequences and imparts life to the controversy.

II. DISTRICT COURT JURISDICTION

Appellants assert that the district court lacked jurisdiction over the subject matter and was unable to grant relief. This claims fails.

The Supreme Court has held recently that a federal question was presented under 28 U.S.C. § 1331 when a non-Indian property owner sued in district court to enjoin execution of a tribal court judgment against it. *National Farmers Union Insurance Cos. v. Crow Tribe*, — U.S. —, 105 S. Ct. 2447, 2452 (1985). Further, 28 U.S.C. § 1345 provides an independent basis for jurisdiction where the United States is the plaintiff. *See United States v. White Mountain Apache Tribe*, 604 F. Supp. 464, 466 (D. Ariz. 1985) (in a similar action, jurisdiction premised on 28 U.S.C. § 1345, *aff'd*, 784 F.2d 917 (9th Cir. 1986).

Appellants concede the "initial" jurisdiction of 28 U.S.C. §§ 1331 and 1345, but argue that relief is limited to the habeas corpus provision of the Indian Civil Rights Act ("ICRA"), 25 U.S.C. § 1303. [2]

That section provides the sole federal remedy for violations of § 1302, which extends civil rights protections like those of the federal Bill of Rights to persons affected by actions of Indian tribal governments. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 67

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[2] § 1303. HABEAS CORPUS. The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

(1978); *Snow v. Quinault Indian Nation*, 709 F.2d 1319, 1323 (9th Cir. 1983), *cert. denied*, 467 U.S. 1214 (1984); *Trans-Canada Enterprises, Ltd. v. Muckleshoot Indian Tribe*, 634 F.2d 474, 476 (9th Cir. 1980).

The ICRA is inapplicable. The United States does not seek enforcement of rights under it. The habeas corpus remedy is inappropriate and inadequate.

Moreover, in *National Farmers*, the Court authorized precisely the kind of federal court action brought here when it said:

> The District Court correctly concluded that a fedesal court may determine under § 1331 whether a tribal court has exceeded the lawful limits of its jurisdiction.

105 S. Ct. at 2452; *see also United States v. White Mountain Apache Tribe*, 784 F.2d 917, 920 (9th Cir. 1986) (federal court had jurisdiction to determine limits of tribe's powers over federal officials) *("White Mountain Apache")*.

III.

SOVEREIGN IMMUNITY OF THE UNITED STATES

The parties recognize that the United States enjoys absolute sovereign immunity from unconsented suits. When federal government officials are sued in their representative capacities, as was done here in tribal court, the question is whether the action is against the United States.

> The general rule is that a suit is against the sovereign of 'the judgment sought would expend itself on the public treasury or domain, or interfere with

> the public administration,' or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'

Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 101 n.11 (1984) (quoting *Dugan v. Rank*, 372 U.S. 609, 620 (1963) (citations omitted)).

The district court concluded correctly that the tribal court's action was directed against the United States. *See White Mountain Apache Tribe v. Hodel*, 784 F.2d 921, 923 n.2 (9th Cir. 1986) (court construes complaint naming government officials as action against the United States); *White Mountain Apache*, 784 F.2d at 919 (tribe's effort to enjoin work of any federal agent in the performance of his official duties is action against the United States). The tribal court's restraining order impeded management and operation of a federal irrigation project.

Appellants seek to invoke the *ultra vires* exception to sovereign immunity of federal officials. They contend that WIP and Hilderbrand violated the federal constitution, statutes and regulations. They cite the Sohappys' allegation that, before rights-of-way can be granted over Indian trust lands, a majority of the owners must give written consent. *See* 25 U.S.C. §§ 323-28; 25 C.F.R. § 169.3. They say also that just compensation must be paid to allottees for canal rights-of-way. 25 U.S.C. § 325; 25 C.F.R. §§ 169.12, 169.13.

The constitutional claims must be analyzed separately from the claims based on Hildebrand's violation

of the federal regulations cited. These claims are subject to different rules.

According to *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), suits that charge federal officials with unconstitutional acts are not barred by sovereign immunity. *Id.* at 690, 696-97, 702. In *Larson*, the Supreme Court noted that when a federal official commits an unconstitutional act, he is necessarily acting outside his official capacity.

If the official is acting pursuant to an unconstitutional statute, he cannot be acting on behalf of the government because the government authority conferred upon him is not valid. *Id.* at 690-92, 696-97. Similarly, if a federal official, acting pursuant to a constitutional statute, commits an unconstitutional act, he cannot be acting on behalf of the government because his actions go beyond the scope of his authority and are *ultra vires*. *Id.*

Any claim making such constitutional allegations is not barred by sovereign immunity and will be within the jurisdiction of the federal court. *Id.* at 701-02. The claim, however, may be made only against the official and not against the United States, as the official was acting individually and not in his capacity as a government agent. *Id.*

There is no substantial claim that Hilderbrand's act was unconstitutional. The result of his act may give rise to a claim for just compensation under the fifth

amendment. Indeed, if that is the claim, suit may be brought in a proper forum. *See Larson*, 337 U.S. at 697, n.18. Rather, the thrust of appellants' claim is that Hilderbrand lost his sovereign immunity protection due to violation of a statute and regulation.

A different analysis applies to the claims based on an official's violations of federal statutes or regulations. Here, the appellants, relying on the Bureau's admission that Hilderbrand should have secured their consent before undertaking changes, argue that violations of the provisions cited above stripped him and WIP of immunity. They are mistaken. Their position has been rejected repeatedly by the Supreme Court. *See Larson* at 695.

If an employee of the United States acts completely outside his governmental authority, he has no immunity. An obvious example would be if a dispute occurs pertaining to the sale of an employee's personal house, his government employment provides him with no shield to liability. *See Larson*, 337 U.S. at 689. But that is different from the situation where an employee, acting as a government agent, commits an act that is arguably a mistake of fact or law. In *Aminoil U.S.A., Inc. v. California State Water Resources Control Board*, 674 F.2d 1227 (9th Cir. 1982), the question was presented whether a government agent's decision that Aminoil violated a statute was "beyond the scope of his authority and [was] therefore not barred by

sovereign immunity." *Id.* at 1234. Aminoil argued that because the agent's decision was incorrect, the decision was beyond the scope of the agent's authority and was therefore not protected by sovereign immunity. *Id.* at 1234. We held that "*Larson*, however, clearly rejected this argument. A simple mistake of fact or law does not necessarily mean that an officer of the government has exceeded the scope of his authority. Official action is still action of the sovereign, even if it is wrong, if it 'do[es] not conflict with the terms of [the officer's] valid statutory authority . . . .' 337 U.S. at 695, 69 S. Ct. at 1464." We need not decide in this case at what point a violation of a statute or regulation is so inconsistent with the agent's authority that he divests himself of sovereign immunity. We do hold that, unlike constitutional violations, there is no per se divestiture of sovereign immunity when statutes or regulations are violated while an agent is pursuing his authorized duties.

Scope of authority turns on whether the government official was empowered to do what he did; i.e., whether, even if he acted erroneously, it was within the scope of his delegated power. *Pennhurst*, 465 U.S. at 112 n.22. *Ultra vires* claims rest on the official's lack of delegated power. *Id.* at 101 n.11.

Here, the Yakima treaty grants federal government personnel authority to enter the reservation without the Yakimas' permission. Hilderbrand was em-

ployed as Project Engineer for a Bureau irrigation project being operated for the tribe. He sought to relocate a canal to improve the Sohappys' land and to benefit WIP users.

Clearly, as project engineer, he had authority to relocate irrigation canals to better serve the Yakimas. Although he may have violated statutes and regulations regarding owner consent to right-of-way changes, those trespasses do not strip him of immunity.

The affidavits of the Sohappys opposing summary judgment do not dispel this conclusion. They do no more than embrace improper legal conclusions on scope of authority.

The only facts they allege on personal knowledge deal with consent to enter the allotment for purposes of canal relocation. It is immaterial whether they consented. *See Angel v. Seattle-First National Bank*, 653 F.2d 1293, 1299-1300 (9th Cir. 1981) (party opposing summary judgment must show relevance of factual disputes). The proper inquiry is whether Hilderbrand acted within the scope of his delegated authority. There were no genuine issues of material fact.

The question then is whether the United States was entitled to judgment as a matter of law. *White Mountain Apache* controls. There, we held that the White Mountain Apache Tribal Court lacked jurisdiction to enjoin Interior Department employees from transferring materials to the Justice Department for filing

water rights claims on the tribe's behalf. 784 F.2d at 919; *see also United States v. Blackfeet Tribe*, 364 F. Supp. 192, 194 (D. Mont.) (tribal court lacks power to regulate federal law officer in the performance of his duties), *aff'd on rehearing*, 369 F. Supp. 562 (D. Mont. 1973).

The district court held correctly that the tribal court action was an unconsented suit against the United States barred by sovereign immunity. *See White Mountain Apache*, 784 F.2d at 919. [3]

IV. EXHAUSTION OF TRIBAL COURT REMEDIES

Appellants rely on *National Farmers* and *A & A Concrete, Inc. v. White Mountain Apache Tribe*, 781 F.2d 1411 (9th Cir.), *cert. denied*, 106 S. Ct. 2008 (1986), to require exhaustion of tribal court remedies in this case. They assert that the United States should have appealed Judge Ward's orders to the tribal appellate court. We disagree.

In *National Farmers*, the Court required exhaustion because the tribal court's power to exercise jurisdiction was "not automatically foreclosed." 105 S. Ct. at 2453. Where the tribal court lacks jurisdiction, however, exhaustion is not required.

A similar challenge recently was rejected in *White Mountain Apache*. There, we concluded that exhaus-

[3] This case concerns the propriety of the tribal court forum. The government concedes that the Sohappys could have brought their action in federal district court.

tion was pointless because tribal court jurisdiction clearly was foreclosed by the sovereign immunity of the United States. 784 F.2d at 920 n.10. That decision controls here. [4] The government was not required to appeal Judge Ward's orders before bringing this action.

V. TRIBAL SOVEREIGN IMMUNITY

Appellants assert that tribal sovereign immunity bars this action. The district court recognized the general rule that tribal officials generally enjoy immunity from suit when acting within the scope of their authority. *See also Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479-80 (9th Cir. 1985) (tribal immunity extends to tribal officials acting in representative capacity and within scope of their authority). It concluded:

> The Tribe's sovereign immunity (and the judge's immunity as a derivative thereof) does not, however, act as a shield against the United States. Like each of the fifty states, the Yakima Nation is not immune from suits brought by the United States. *See United States v. Mississippi*, 380 U.S. 128 (1965). Thus, the United States is not barred from bringing this action.

Appellants criticize the court's citation to *Mississippi*, asserting that the case is inapposite because

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[4] *A & A Concrete, Inc. v. White Mountain Apache Tribe*, 781 F.2d 1411 (9th Cir.), *cert denied*, 106 S. Ct. 2008 (1986), relied on by appellants, is distinguishable because it does not involve the United States as a party or the relationship between sovereign immunity and tribal court jurisdiction.

it involved the Eleventh Amendment. *Mississippi* is relevant for its holding that the United States could sue a state defendant and "override" the sovereign immunity of the states. *See United States v. Mississippi*, 380 U.S. 128, 140-41 (1965).

By analogy, the United States may sue Indian tribes and override tribal sovereign immunity. "The Tribe's own sovereignty does not extend to preventing the federal government from exercising its superior sovereign powers." *White Mountain Apache*, 784 F.2d at 920. The tribal immunity claim fails.

VI. JUDICIAL IMMUNITY

Lastly, we address briefly appellant Ward's assertion of the judicial immunity defense. That defense does not bar injunctive relief against a judicial officer acting in his judicial capacity. *Pulliam v. Allen*, 466 U.S. 522, 541-42 (1984); *Ashelman v. Pope*, No. 84-1580, slip op. at __ (9th Cir. July 8, 1986) (en banc).

The district court enjoined Judge Ward from enforcing the restraining orders he had entered. His status as a tribal judicial officer does not confer immunity against injunctive relief. *See United States v. Blackfeet Tribe*, 369 F. Supp. 562, 565 (D. Mont. 1973) ("courts may be and are restrained from acting in excess of jurisdiction").

The district court's judgment is AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-3927

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

VS.

YAKIMA TRIBAL COURT OF THE YAKIMA INDIAN NATION AND DAVID WARD, TRIBAL JUDGE, DEFENDANTS-APPELLANTS.

APPEAL from the United States District Court for the _____
District of _____

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of Washington (Spokane) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the _____ judgment of the said District Court in this Cause be, and hereby is AFFIRMED.

Filed and entered 7/21/86

No. 85-3927

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

vs.

YAKIMA TRIBAL COURT OF THE YAKIMA INDIAN NATION AND DAVID WARD, TRIBAL JUDGE, DEFENDANTS-APPELLANTS.

ORDER

Before: WRIGHT and WALLACE, Circuit Judges, and LEGGE,* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judge Wallace has voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and a judge in active service requested that a vote be taken. Fed. R. App. P. 35(b). Upon the vote of the judges in active service, a majority voted against en banc rehearing.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Filed and entered 12/4/86

* Of the Northern District of California.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. C-84-225-JLQ

UNITED STATES OF AMERICA, PLAINTIFF,

VS.

YAKIMA TRIBAL COURT OF THE YAKIMA INDIAN NATION AND DAVID WARD, TRIBAL JUDGE, DEFENDANTS.

Order Granting Plaintiff's Motion for Summary Judgment and Denying Defendants' Cross-Motion

As scheduled, a hearing was held in Yakima, Washington on May 21, 1985. Assistant United States Attorney Robert Sweeney appeared on behalf of plaintiff; defendants were represented by James Hovis.

Upon consideration of the record and the oral presentations of counsel, the court rules as follows: the United States' Motion For Summary Judgment (Ct. Rec. 7) is GRANTED and the defendants' cross-Motion For Summary Judgment (Ct. Rec. 14) is DENIED. [1]

It is unquestioned that generally the Yakima Nation (and presumably its court) is absolutely immune from suit (absent waiver), *Chemehuevi Indian Tribe v. California State Board of Equalization*, 757 F.2d 1047 (9th Cir. 1985). That immunity extends to tribal officials such as Judge Ward, provided their challenged

[1] This Opinion and Order supplements the oral decision of the court rendered at the conclusion of the hearing.

actions were within the scope of their authority. *Id.* at 1052. The Tribe's sovereign immunity (and the judge's immunity as a derivative thereof) does not, however, act as a shield against the United States. Like each of the fifty states, the Yakima Nation is not immune from suits brought by the United States. *See United States v. Mississippi*, 380 U.S. 128 (1965). Thus, the United States is not barred from bringing this action.

On the other hand, the sovereign immunity of the United States does operate as against the defendants. The Yakima Nation Tribal Court and Judge Ward were without jurisdiction over the Bureau of Indian Affairs Wapato Indian Irrigation Project and its Project Engineer, Lewis Hilderbrand. *See Aminoil U.S.A. v Gorsuch*, 674 F.2d 1227 (9th Cir. 1982). Hilderbrand was clearly operating within the scope of his official capacity and authority; therefore, the tribal court action against him was a prohibited, unconsented suit against the United States. *See Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949); *Aminoil U.S.A. v. Gorsuch*, 674 F.2d 1227 (9th Cir. 1982). Consequently, the March 11, 1983 and March 15, 1983 Temporary Restraining Orders and the April 26, 1983 Permanent Restraining Order were entered without jurisdiction and are HEREBY DECLARED NULL AND VOID. Accordingly, the defendants are HEREBY PERMANENTLY ENJOINED from tak-

ing any action to enforce those Orders.

Accordingly, the Clerk is DIRECTED to enter judgment in favor of the plaintiff and against the defendants. The Clerk is further DIRECTED to close this file.

IT IS SO ORDERED. The Clerk is directed to enter this Order and forward copies to counsel.

DATED this 24th day of May, 1985.

ss. _____

JUSTIN L. QUACKENBUSH
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
No. C-84-225-JLQ

UNITED STATES OF AMERICA

v.

YAKIMA TRIBAL COURT OF THE YAKIMA INDIAN NATION AND DAVID WARD, TRIBAL JUDGE

JUDGMENT IN A CIVIL CASE

IT IS ORDERED AND ADJUDGED that the United States' Motion For Summary Judgment is granted and the defendants' Motion For Summary Judgment is denied; and judgment is entered in favor of the plaintiff.

Dated May 24, 1985

APPENDIX E

U.S. CONSTITUTION

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX F

5 U.S.C. § 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

(Sept. 6, 1966, P. L. 89-554, § 1, 80 Stat. 392; Oct. 21, 1976, P. L. 94-574, § 1, 90 Stat. 2721).

APPENDIX G

25 U.S.C. § 324. **Consent of certain tribes; consent of individual Indians**

No grant of a right-of-way over and across any lands belonging to a tribe organized under the Act of June 18, 1934 (48 Stat. 984), as amended; the Act of May 1, 1936 (49 Stat. 1250); or the Act of June 26, 1936 (49 Stat. 1967 [25 USCS Secs. 501 et seq.], shall be made without the consent of the proper tribal officials. Rights-of-way over and across lands of individual Indians may be granted without the consent of the individual Indian owners if (1) the land is owned by more than one person, and the owners or owner of a majority of the interests therein consent to the grant; (2) the whereabouts of the owner of the land or an interest therein are unknown, and the owners or owner of any interests therein whose whereabouts are known, or a majority thereof, consent to the grant; (3) the heirs or devisees of a deceased owner of the land or an interest therein have not been determined, and the Secretary of the Interior finds that the grant will cause no substantial injury to the land or any owner thereof; or (4) the owners of interests in the land are so numerous that the Secretary finds it would be impractical to obtain their consent, and also finds that the grant will cause no substantial injury to the land or any owner thereof. (Feb. 5, 1948, ch 45, Sec. 2, 62 Stat. 18.)

25 U.S.C. § 325. Payment and disposition of compensation

No grant of a right-of-way shall be made without the payment of such compensation as the Secretary of the Interior shall determine to be just. The compensation received on behalf of the Indian owners shall be disposed of under rules and regulations to be prescribed by the Secretary of the Interior. (Feb. 5, 1948, ch 45, Sec. 3, 62 Stat. 18.)

APPENDIX H

25 U.S.C. § 1302. Constitutional rights

No Indian tribe in exercising powers of self-government shall—

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines,

inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

(Apr. 11, 1968, P. L. 90-284, Title II, § 202, 82 Stat. 77).

25 U.S.C. § 1303. Habeas corpus

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

(Apr. 11, 1968, P. L. 90-284, Title II, § 203, 82 Stat. 78.)

APPENDIX I

25 C.F.R. Part 169.3 **Consent of landowners to grants of right-of-way**

(a) No right-of-way shall be granted over and across any tribal land, nor shall any permission to survey be issued with respect to any such lands, without the prior written consent of the tribe.

(b) Except as provided in paragraph (c) of this section, no right-of-way shall be granted over and across any individually owned lands, nor shall any permission to survey be issued with respect to any such lands, without the prior written consent of the owner or owners of such lands and the approval of the Secretary.

(c) The Secretary may issue permission to survey with respect to, and he may grant rights-of-way over and across individually owned lands without the consent of the individual Indian owners when (1) the individual owner of the land or of an interest therein is a minor or a person non compos mentis, and the Secretary finds that such grant will cause no substantial injury to the land or the owner, which cannot be adequately compensated for by monetary damages; (2) the land is owned by more than one person, and the owners or owner of a majority of the interests therein consent to the grant; (3) the whereabouts of the owner of the land or an interest therein are unknown, and the owners or owner of any interests therein whose

whereabouts are known, or a majority thereof, consent to the grant; (4) the heirs or devisees of a deceased owner of the land or an interest therein have not been determined, and the Secretary finds that the grant will cause no substantial injury to the land or any owner thereof; (5) the owners of interests in the land are so numerous that the Secretary finds it would be impracticable to obtain their consent, and also finds that the grant will cause no substantial injury to the land or any owner thereof. [36 FR 14183, July 31, 1971. Redesignated at 47 FR 13327, Mar. 30, 1982]

APPENDIX J

Area Director, Phoenix Area Office

Commissioner of Indian Affairs

Right-of-way, Irrigation Project Works

This office received a request from the San Carlos Irrigation Project Engineer for a Solicitor's opinion to determine whether irrigation projects are required to secure rights-of-way documents, specifically for previously constructed works.

The policy established by this Bureau regarding rights-of-way over Indian lands is clearly set forth in 54 BIAM 1. It is as follows:

> "The Bureau's responsibility in making grants of rights-of-way over Indian land stems from the United States Government's responsibilities as trustee for the land. Therefore, grants of rights-of-way shall be made in such manner as to discharge properly the responsibilities and obligations of a trustee to the owner of the land; that is, to assure that the rights of each of the owners of the land are protected: The granting of a right-of-way differs from the usual leasing, permitting, and other land transactions where the trust or restricted Indian landowner leases or permits with the approval of the Secretary. In rights-of-way, the Secretary, as provided by Congress, grants the right-of-way with the consent of the Indian landowner as provided in the enabling legislation. Therefore, in carrying out the trust responsibility as the grantor, the express grant should be in writing in the form of an easement since an easement for right-of-way creates an interest in the land, is a limited use or enjoyment, can be protected against third parties, is not terminable at will by the Indian landowner (possessory owner), is not a natural right but a created right which is capable of

being created by conveyance. The conveyance instrument must outline the nature and limited extent of the right-of-way issues relating to the use and purpose, width, length, duration, what use the possessory interest owner may make of the land under an electrical transmission line, etc., which are applicable to the right-of-way to be granted."

The Secretary's regulations contained in 25 CFR 161 are designed to carry out the above policy. The Government must, as a legally responsible trustee, protect the rights of owners of trust land. Formal rights-of-way grants are therefore required in order to properly occupy or use a right-of-way. In the absence of such a document, duly approved by the appropriate Government representative, any user must be considered as a trespasser.

In the case of irrigation works, Solicitor's opinions issued in the 1940's had some small differences as to whether irrigation rights-of-way were in fact reserved on any Indian-owned lands by the act of August 30, 1890. Assuming that they were reserved, such reservation simply provided for procurement. As rights-of-way were procured and occupied formal documentation, including metes and bounds surveys and appropriate drawings showing physical location and total land area occupied, should have been prepared and approved by the appropriate authority. If such documents were not prepared, then by all means they must be prepared and entered into the official land record now. Ample authority exists in 25 USC 326 to

approve such documents pursuant to statutory authority in existence at the time the right-of-way was occupied.

We cannot knowingly continue to use trust lands, for which the United States is responsible, in a manner that violates our manual and the Secretary's regulations, and infringes on the rights of the Indian owners in and to those lands. You must, therefore, take every reasonable action to insure the proper documentation and approval of rights-of-way now occupied and/or used by Bureau installations within your jurisdiction. Please prepare a report showing the magnitude of the problem and your plan for solving it, to reach this office by January 1, 1976. By copy of this memo all Area Directors are requested to do the same.

/s/ Morris Thompson

All Area Directors

cc: Surname
200 - BCCO
chron. - mailroom

210: WRBooker:cc 9/29/75

Supreme Court, U.S.
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No. 86-1425

In the Supreme Court of the United States

OCTOBER TERM, 1986

YAKIMA TRIBAL COURT OF THE YAKIMA INDIAN NATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners challenge the court of appeals' ruling that sovereign immunity barred a tribal court from enjoining federal government activities.

1. The Wapato Irrigation Project (Project), a federal project administered and operated by the Bureau of Indian Affairs, delivers irrigation water to the Yakima Indian Reservation. The Reservation is located in the southeastern part of the State of Washington and consists of more than 1.3 million acres of land. Approximately 80% of the Reservation is held in trust by the United States for the Yakima Tribe or its members.

An irrigation canal that is part of the Project has for years run across certain allotted land within the Reservation. In 1980, an employee of the Project and the tenants on the allotment at issue discussed relocation of a piece of the canal, from one place on the allotment to another, for the purpose of enhancing the land's value. The Project began the relocation, but before the work could be completed, the allotment owners ordered the workers off their

property. In April 1981, the allottees agreed, in exchange for $11,000, to permit conveyance of water through a temporary canal for a two-year period and completion of the relocation at the end of that period. Pet. App. 2a-3a.

Despite the agreement, in April 1983, three weeks before the end of the two-year period, the allottees filed a complaint in tribal court, naming the Project and the project engineer as defendants and seeking to prevent the completion of the canal relocation. The complaint was served at the Wapato Project Office. Although the named defendants did not appear in the tribal court proceeding, an Assistant Regional Solicitor of the Department of the Interior wrote to petitioner Judge Ward of the Yakima Tribal Court, asserting that the tribal court was without jurisdiction over the United States and suggesting that the proper forum was the federal district court. The Regional Solicitor noted that Article 2 of the Treaty with the Yakima Indian Nation, Jan. 9, 1855, 12 Stat. 952, allows employees of the "Indian Department" to be on the Reservation. See Pet. App. 4a; E.R. 11.[1]

On April 26, 1983, petitioner Judge Ward of the tribal court entered an order permanently restraining the project engineer and the Project from entering the allotment at issue. The United States then filed this action in the United States District Court for the Eastern District of Washington, contending that the tribal court's injunction was null and void and seeking declaratory and injunctive relief. On cross-motions for summary judgment, the district court granted the government the requested relief against the tribal court order. Pet. App. 20a-22a.

Acknowledging that the Yakima Tribe and its court were generally immune from suit (Pet. App. 20a), the district court nonetheless held that it had jurisdiction over the tribal court and tribal judge because the Tribe's im-

[1] "E.R." refers to the Excerpt of Record in the court of appeals.

munity did not "act as a shield against the United States" (*id.* at 21a), any more than the sovereign immunity of the individual states shielded them from suits by the United States (*ibid.*). On the merits, the district court held that, because of the sovereign immunity of the United States, the tribal court was without jurisdiction over the federal defendants (*ibid.*). The court concluded that the project engineer "was clearly operating within the scope of his official capacity and authority; therefore, the tribal court action against him was a prohibited, unconsented suit against the United States" (*ibid.*).

2. The court of appeals affirmed (Pet. App. 1a-17a). At the outset, the court held that, despite a recent agreement between the allottees and the Department of the Interior over a government right-of-way for the canal, the case was not moot.[2] The court of appeals also ruled (*id.* at 8a-9a) that the district court had subject matter jurisdiction both under 28 U.S.C. 1345, which provides for jurisdiction over suits brought by the United States, and under 28 U.S.C. 1331, which provides for jurisdiction over claims that " ' a tribal court has exceeded the lawful limits of its jurisdiction' " (Pet. App. 9a, quoting *National Farmers Union Insurance Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845, 853 (1985)).

On the merits of the government's challenge to the tribal court proceeding, the court of appeals held that the tribal court's exercise of jurisdiction over the Project and its

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[2] While the case was on appeal, the allottees agreed, in exchange for $18,000, to grant the Department of the Interior a right-of-way over the allotment. After receiving supplemental briefing, the court of appeals ruled that the appeal was not moot because the parties to the agreement were not the same as the parties to this federal lawsuit, the tribal court injunction was broader than the particular dispute and remained in effect, and declaring the appeal moot would result in vacating the district court order and hence leave the tribal court injunction in place. Pet. App. 6a-7a. We agree that the case is not moot.

engineer was prohibited by the sovereign immunity of the United States, since there was no consent to suit in the tribal court. Pet. App. 9a-15a.[3] The court rejected petitioners' argument that the ultra vires exception to the federal government's sovereign immunity (see *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949)) applied to this case. Petitioners had made "no substantial claim" of an unconstitutional taking, and if the allottees are due just compensation, a proper forum exists for them to claim it (Pet. App. 11a-12a). Moreover, although the Project engineer, in beginning relocation of the canal without the allottees' consent, may well have violated federal statutes and regulations (25 U.S.C. 323-328; 25 C.F.R. 169.3, 169.12, 169.13), he and other Project employees were clearly acting within the scope of their treaty authority to enter the Reservation without consent and within the scope of their valid Project authority "to relocate irrigation canals to better serve the Yakimas" (Pet. App. 13a-14a).

Having concluded that sovereign immunity plainly barred the tribal court proceeding, the court of appeals next held that, because tribal court jurisdiction in the case was thus " 'automatically foreclosed' " (Pet. App. 15a (quoting *National Farmers Union Insurance Cos.* v. *Crow Tribe of Indians*, 471 U.S. at 855)), the United States was not required to exhaust tribal court remedies as a precondition to this federal suit (Pet. App. 15a, citing *United*

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[3] Congress has not consented to tribal court suits like that at issue here. Petitioners suggest (Pet. 12) that a provision of the Administrative Procedure Act, 5 U.S.C. (Supp. III) 702, gives the required consent. That provision, however, does not express the United States' consent to suit in *tribal* court, which is what would be required. See *Block* v. *North Dakota*, 461 U.S. 273, 289 (1983).

The tribal court suit was plainly against the United States. It sought to interfere with federal functions (the Project) and was brought against a federal entity and a federal officer acting in his official capacity. Pet. App. 9a-10a.

States v. *White Mountain Apache Tribe*, 784 F.2d 917, 920 n.10 (9th Cir. 1986)). Finally, the court of appeals held that the Tribe's sovereign immunity is no bar to this suit by the United States, a superior sovereign. " 'The Tribe's own sovereignty does not extend to preventing the federal government from exercising its superior sovereign powers' " (Pet. App. 17a (quoting *White Mountain Apache Tribe*, 784 F.2d at 920)).[4]

3. Petitioner contends that the court of appeals erred in holding the tribal court suit barred by sovereign immunity, in failing to require the United States to exhaust tribal court remedies, and in refusing to recognize petitioners' immunity from suit in federal court. These contentions are without merit. The decision of the court of appeals is correct and is not in conflict with any decision of this Court or of any other court of appeals. Accordingly, further review by this Court is not warranted.

a. Petitioners contend (Pet. 10-14) that the court of appeals' holding that the tribal court suit was barred by the sovereign immunity of the United States is in conflict with this Court's decisions in *Larson* v. *Domestic & Foreign Commerce Corp., supra,* and *Malone* v. *Bowdoin*, 369 U.S. 643 (1962). Because the court of appeals expressly applied the rule articulated in those cases (Pet. App. 9a-15a), petitioners' only argument is that the court of appeals misapplied the rule. For the reasons given by the court of appeals, petitioners' argument is erroneous.

Although the United States and its agencies (and hence government officers, when the suit is effectively one against the government) are immune from suit "in the absence of an express waiver of this immunity by Congress" (*Block* v. *North Dakota*, 461 U.S. 273, 280 (1983)),

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[4] The court of appeals, citing *Pulliam* v. *Allen*, 466 U.S. 522, 541-542 (1984), also rejected petitioners' suggestion that a tribal judge has immunity from an injunction against acting in excess of jurisdiction (Pet. App. 17a).

this Court in *Larson* and *Malone* stated that a federal government officer may be sued for an action affecting property interests where the officer's actions are either unconstitutional or wholly outside the scope of his authority (see *id.* at 281; *Dugan* v. *Rank*, 372 U.S. 609, 621-622 (1963)).[5] In this case, however, as the court of appeals concluded (Pet. App. 11a-12a), there is "no substantial claim" that the Project actions on the allotted land violated the Constitution: the allottees have been paid (in April 1981 and December 1985) for a government right-of-way for the irrigation canal; and there is a forum for claiming any just compensation due to the allottees. See *MacDonald, Sommer & Frates* v. *County of Yolo*, No. 84-2015 (June 25, 1986), slip op. 10-11 (no constitutional taking claim where property owner has not pursued adequate remedy for just compensation); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-136 (1974). Moreover, although the Project officials "may have violated statutes and regulations regarding owner consent to right-of-way changes" (Pet. App. 14a), "[t]he Court in *Larson* made crystal clear that an officer might make errors and still be acting within the scope of his authority" (*Pennhurst State School & Hospital* v. *Halderman*, 465 U.S. 89, 122 n.22 (1984); see *id.* at 101 n.11 (citation omitted) (officer acts "ultra vires only when he acts 'without any authority whatever' "); *Larson*, 337 U.S. at 690, 695). Petitioners merely reassert statutory and regulatory errors; they do not even challenge the court of appeals' determination, which is plainly correct, that the Project engineer "acted within the scope of his delegated authority" (Pet. App.

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[5] To the extent that the tribal court suit at issue in this case was brought against the Project, the *Larson-Malone* exception to the sovereign immunity bar is inapplicable. Petitioners' *Larson-Malone* argument applies only insofar as the tribal court suit was brought against a federal officer.

14a) in undertaking a relocation of a federal government irrigation canal on a Reservation allotment in order to enhance the value of the allotment.

b. Petitioners also contend (Pet. 7-10) that the court of appeals erred in not requiring the United States to exhaust tribal court remedies prior to challenging the tribal court's jurisdiction in federal court. We do not question that the exhaustion doctrine announced in *National Farmers Union Insurance Cos.* v. *Crow Tribe of Indians, supra* (see also *Iowa Mutual Insurance Co.* v. *LaPlante*, No. 85-1589 (Feb. 24, 1987)), generally applies to the Yakima Tribe and its courts, as petitioners argue (Pet. 9-10). The doctrine, however, applies only where the question of the tribal court's jurisdiction is "not automatically for[e]closed"; it does not apply where the tribal court's jurisdiction "is patently violative of express jurisdictional prohibitions" (*National Farmers Union Insurance Cos.* v. *Crow Tribe of Indians*, 471 U.S. at 855, 856 n.21). As the court of appeals correctly concluded (Pet. App. 15a-16a), this case falls squarely within that exception because of the clear sovereign immunity bar to the tribal court suit.

c. Petitioners finally contend (Pet. 14-16) that this suit against the tribal court and a tribal judge must be dismissed because the Tribe's immunity from suit can be limited only by " 'affirmative statutory authority' " (Pet. 15, quoting *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 514 (1940)) and there is no such congressional action applicable to this case. Like the court of appeals (Pet. App. 16a), we do not question that Indian tribes generally possess sovereign immunity from unconsented suits, absent congressional action to the contrary. See *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 58-59 (1978); *United States* v. *Kagama*, 118 U.S. 375, 382 (1886). That protection from suit, however, does not apply

to this lawsuit, which was brought by the United States, a superior sovereign, to eliminate an obstruction to its governmental activities.

Petitioners cite no decision of this Court or of any other court that supports their claim of tribal immunity from a federal government suit. And although no decision of this Court is squarely on point, this Court's decisions make clear that the court of appeals' rejection of petitioners' claim was correct. It is fundamental that, even in the absence of a governing treaty or statute, Indian tribes are "implicitly divested" of their inherent sovereignty to the extent that "the exercise of tribal s vereignty would be inconsistent with the overriding interests of the National Government" (*Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 153 (1980)). See *Arizona* v. *San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983); *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978); *Johnson* v. *M'Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823). Because Indian tribes are "fully subordinated to the sovereignty of the United States" (*Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. at 211), immunity from suits brought by the United States in order to protect its governmental activities is one of the attributes of tribes' sovereignty that must be deemed " ' withdrawn * * * by implication as a necessary result of their dependent status' " (*National Farmers Union Insurance Cos.* v. *Crow Tribe of Indians*, 471 U.S. at 852 n.14, quoting *United States* v. *Wheeler*, 435 U.S. 313, 323 (1978)). Loss of this aspect of sovereignty is implicit in the superior sovereignty of the United States for Indian tribes no less than it is for states (cf. *United States* v. *Cherokee Nation*, No. 85-1940 (Mar. 31, 1987), slip op. 7); and this Court has held that the ordinary sovereign immunity protection enjoyed by the states does not operate to shield states against suit by the United States (*United States* v. *Mississippi*, 380 U.S. 128 (1965)).

The tribal court in this case interfered with federal government activities. Accordingly, the court of appeals correctly held that the Tribe's sovereign immunity did not bar the federal court suit brought by the United States to free itself from that unlawful interference. See *United States* v. *White Mountain Apache Tribe, supra.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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